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In re Application of
Koren et al.
Application No. 08/765,324
Filed: December 24, 1996
Attorney Docket No. OMRF 143 CIP (2)

OFFICE OF PETITIONS

ON PETITION

This is a decision on the communication, filed April 22, 2003 and the petition under 37 CFR 1.137(a), filed June 17, 2003, to revive the above-identified application.

The petition is **DISMISSED**.

A renewed petition may be filed, without fee, providing the appropriate evidentiary support to establish nonreceipt of the final Office Action, mailed June 18, 2000. If reconsideration of this decision is desired, petitioner should file a reconsideration petition under 37 CFR 1.37(a) within TWO (2) MONTHS from the date of this decision. Extensions of this two-month time limit are available under 37 CFR 1.136(a). This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The application became abandoned for failure to timely file a reply within the meaning of 37 CFR 1.113 to the final Office Action of June 18, 2002, which set a reply period of (3) three Months from the mail date of the Notice. Accordingly, the application became technically abandoned on September 19, 2003. The Notice of Abandonment was mailed January 29, 2003.

The showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a). See MPEP 711(c)(III)(C)(2) for a discussion of the requirements for a showing of unavoidable delay.

The showing required to establish non-receipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. See Withdrawing the Holding of Abandonment When Office Actions Are Not Received; Notice 1156 Off. Gaz. Pat. Office 53 (November 16, 1993).

Petitioner asserts that USPTO communication mailed June 18, 2002 was not received by the attorney of the record in this application and a search of the files and docket records shows no record of the communication.

Petitioner provides copies of the docket reports printed August 27, 2002, September 27, 2002, and December 18, 2002 to indicate there was no entry for the above-identified application.

Applicant's docket reports indicate no entry for the present application on three dates, which would have indicated the last date a response could have been filed to the Office Action mailed June 18, 2002, if it had been received.

It appears that the submitted docket reports are reminders for applicant's representative to respond to different due dates for a number of applications, rather than being directed towards a log of receipt of all incoming USPTO office communications for the present application.

Further, it appears that the docket reports printed August 27, 2002, September 27, 2002, and December 18, 2002 are representative attorney docket reports but are not comprehensive of the receipt of all incoming USPTO office communications for the present application during the appropriate time period.

Therefore, petitioner has not submitted copies of the docket reports showing required replies docketed from a date three months from the mail date of the alleged non-received Office Action. Petitioner has not provided documentary proof of nonreceipt of the Office Action. See MPEP 711.03(c)(II).

In addition, petitioner has provided copies of the telephone records made by applicant's representative Patrea Pabst to Supervisor Lynette Smith and Examiner Patricia Duffy, whereupon petitioner asserts neither call was returned.

All business with the Patent and Trademark Office should be transacted in writing. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral communications in relation to which there is no record and there may be disagreement or doubt. See MPEP 2002.01 and CFR 1.2.

Here, the written record shows that the final Office Action of June 18, 2002 was mailed to applicant's address of record, which is consistent with applicant's address set forth in the petition under 37 CFR 1.378(a), filed February 13, 2003.

Therefore, petitioner does not support the assertion of lack of receipt of the Office Action in question in a manner which satisfies the Notice published in 1156 OG 53 regarding the minimum requirement requirements for establishing nonreceipt of Office correspondence (see MPEP 711.03(c)).

In the absence of the submission of a showing as discussed herein, there is presently no basis for granting the relief requested.

Alternatively, petitioner may wish to consider filing a petition under 1.137(b) for unintentional abandonment. A reply required for such consideration of a petition to revive must be a Notice of Appeal (and appeal fee required by 37 CFR 1.17(b)), an amendment that *prima facie* places the application in condition for allowance, or the filing of a continuing application. See MPEP 711.03(c)(III)(A)(2)(b). Jurisdiction with respect to such a petition also is in the Office of Petitions. An unintentional petition under 37 CFR 1.137(b) must be accompanied by the \$1300.00 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:	Mail Stop PETITION Commissioner for Patents P.O. Box 1450 Alexandria, VA 22313-1450
By facsimile:	(703) 308-6916 Attn: Office of Petitions
By hand:	Office of Petitions 2201 South Clark Place Crystal Plaza 4, Suite 3C23 Arlington, VA 22202

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Telephone inquiries concerning this decision should be directed to Phillip Gambel at (703) 305-4066.

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